COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP423 **Cir. Ct. No. 2002CV1134**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CHRISTINE L. EVENSON,

PLAINTIFF-RESPONDENT,

V.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), LOCAL 2492-A,

DEFENDANT-CO-APPELLANT,

COUNCIL 40, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO,

DEFENDANT-APPELLANT.

APPEALS from a judgment of the circuit court for Marathon County: GARY L. CARLSON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 LUNDSTEN, J. American Federation of State, County, and Municipal Employees (AFSCME), Local 2492-A, and Council 40, AFSCME, appeal the circuit court's summary judgment ordering them to pay Christine Evenson's attorney's fees for breaching their duty of fair representation.[1] Evenson, a Marathon County employee, was terminated from employment as a result of a grievance filed by Local 2492-A with the assistance of Council 40. Evenson hired an attorney, who assisted her in obtaining reinstatement. Evenson then brought this action against the union defendants, alleging a breach of their duty to provide her with fair representation and seeking damages for the attorney's fees she incurred to get her job back. Evenson also requested her attorney's fees for prosecuting this lawsuit. The circuit court granted summary judgment in favor of Evenson, concluding that the union defendants violated their duty of fair representation. The court awarded Evenson $8,178.80 in attorney's fees and costs incurred to obtain reinstatement and $28,915.61 in attorney's fees and costs incurred prosecuting this lawsuit.

¶2 The union defendants make the following arguments: (1) they did not owe Evenson a duty of fair representation; (2) even if they did owe Evenson a duty of fair representation, they are not liable for breaching that duty; and (3) even if they are liable to Evenson, the circuit court erred in awarding Evenson all of her attorney's fees as damages.

[1] Throughout this opinion, we will often refer to Local 2492-A and Council 40 collectively as "the union defendants."

¶3 We conclude that Evenson is entitled to the $8,178.80 in attorney's fees and costs she incurred to obtain reinstatement. We also conclude that Evenson is entitled to the portion of the $28,915.61 amount attributable to costs. However, under the "American Rule," which applies to this suit seeking damages for the union defendants' breach of their duty of fair representation, Evenson is not entitled to the attorney's fees she incurred for prosecuting the suit. Accordingly, we affirm in part and reverse in part, with directions to the circuit court that it amend the judgment to eliminate the portion of the award covering attorney's fees expended for prosecuting this case.

Background

¶4 Evenson had been employed by Marathon County since May 1983. Prior to January 1, 2000, she worked in the Juvenile Court Services Department as an intake and dispositional worker. Employees in that department were in a collective bargaining unit represented by AFSCME Local 2492-D, which consisted of certain county "professional" employees.

¶5 Effective January 1, 2000, employees in the Juvenile Court Services Department, including Evenson, were merged into the Department of Social Services. "Professional" employees of that department were represented by Local 2492-A.

¶6 Merged employees who did not have a social worker license, including Evenson, were required to obtain the necessary credentials for licensure by a given deadline. Evenson received several extensions of her deadline, the last of which required her to provide proof of full certification as a social worker by July 14, 2002.

¶7 In April 2002, Local 2492-A filed a grievance concerning Evenson. The complaint underlying the grievance was that Evenson was an "uncertified worker" who was improperly filling a social worker position. Local 2492-A sought to have the position filled with a certified social worker. As a result of the grievance, Evenson was discharged effective July 12, 2002, even though she presented proof of the required credentials on that date, two days before the July 14 deadline.

¶8 Evenson retained an attorney, who, among other things, filed an appeal with the county under its civil service ordinance rules on Evenson's behalf. The county reinstated Evenson, effective September 16, 2002, under the terms of a three-way agreement between Evenson, the county, and a union representative.

¶9 Evenson sued Local 2492-A and its affiliate Council 40, alleging a breach of the duty of fair representation. As damages, she sought to recoup the attorney's fees she incurred because of the alleged breach, including the attorney's fees she incurred in prosecuting her action against the union defendants.

¶10 The union defendants moved for summary judgment, but the circuit court granted summary judgment in favor of Evenson. The court determined that the parties were in agreement as to the material facts, and concluded as follows:

> [The union] filed a grievance with the employer to have [Evenson] removed from the job. The court is satisfied that that is totally contrary to the role of the union with respect to taking meaningful fair representation of one of their members.

As already indicated, the court awarded Evenson the attorney's fees and costs she sought, for a total judgment of $37,094.41.

¶11 We reference additional facts as needed below.

Discussion

¶12 We review summary judgment *de novo*, applying the same methodology as the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). That methodology is well established and need not be repeated in its entirety here. Suffice to say that summary judgment is appropriate when undisputed facts show that a party is entitled to judgment as a matter of law. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

¶13 It is important to recognize in this case that the union defendants' challenge to the circuit court's decision on appeal is *not* that there is one or more disputed material facts. Rather, so far as we can discern, the union defendants seek reversal based only on their assertion that they, not Evenson, are entitled to summary judgment.[2] Consequently, it is incumbent upon the union defendants to demonstrate that the undisputed facts and applicable legal principles entitle them to judgment as a matter of law. For reasons that we discuss further below, the union defendants fail in this endeavor, and for that reason we decline to overturn the circuit court's grant of summary judgment to Evenson.

[2] Council 40's briefing is clear on this point. It specifically requests as relief that its "Motion for Summary Judgment should be granted and the lawsuit against [it] should be dismissed." Moreover, Council 40 asserts that "[t]he material facts of this case are not seriously disputed." Local 2492-A is less clear in its request for relief, but nowhere in its briefing does Local 2492-A argue that we should reverse the circuit court because there remains a genuine issue of material fact. We conclude that the only reasonable reading of Local 2492-A's brief is that Local 2492-A, like Council 40, is arguing that it is entitled to summary judgment, not that there remains one or more genuine issues of material fact for trial.

A. Whether The Union Defendants Owed Evenson A Duty Of Fair Representation

1. Whether Local 2492-A Owed Evenson A Duty Of Fair Representation

¶14 Local 2492-A argues that it did not owe Evenson a duty of fair representation because, although Evenson may have been a member of Local 2492-D, Evenson was never a member of Local 2492-A. Local 2492-A fails, however, to set forth any legal framework for determining responsibility for an employee's local representation under circumstances like those presented here. For that matter, it does not appear that Local 2492-A's no-duty argument is based on undisputed facts. Accordingly, we could simply stop here, declining to address that argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address issues that are inadequately briefed). Nonetheless, we will address some of Local 2492-A's more prominent assertions in order to show why those assertions are insufficient.

¶15 We begin by observing that both Local 2492-A and Local 2492-D have collective bargaining agreements that define which county employees are represented by which local bargaining units. According to these collective bargaining agreements, both Local 2492-A and Local 2492-D consist of "professional" employees. Local 2492-A's collective bargaining agreement defines its bargaining unit as:

> all regular full-time and regular part-time *professional* employees of the Marathon County Department of Social Services …. *Employees expressly excluded from representation include nonprofessional employees*, and all managerial, confidential and supervisory employees.

(Emphasis added.) Local 2492-D's collective bargaining agreement defines its unit as:

> all regular full-time and regular part-time *professional* employees in the employ of Marathon County pursuant to the Wisconsin Employment Relations Commission Decision No. 19129-D, Case LII, No. 27546, ME-1970 …. Employees expressly excluded from representation include all confidential, supervisory and managerial employees and all other employees of Marathon County.

(Emphasis added.)

¶16 One of Local 2492-A's principal arguments is that it did not represent Evenson because she was not a "professional" employee as defined by WIS. STAT. § 111.70(1)(L) until she obtained her social worker credentials.[3] There

[3] WISCONSIN STAT. § 111.70(1)(L) (2005-06) provides as follows:

> "Professional employee" means:
>
> 1. Any employee engaged in work:
>
> a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
>
> b. Involving the consistent exercise of discretion and judgment in its performance;
>
> c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
>
> d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or
>
> 2. Any employee who:
>
> a. Has completed the courses of specialized intellectual instruction and study described in subd. 1.d.;
>
> b. Is performing related work under the supervision of a professional person to qualify to become a professional employee as defined in subd. 1.

(continued)

is no dispute, however, that, before the merger, Evenson was represented by Local 2492-D, a bargaining unit also consisting of professional employees. Local 2492-A makes no attempt to explain why Evenson was a professional employee for purposes of representation by Local 2492-D but not for purposes of representation by Local 2492-A. Similarly, Local 2492-A does not explain why the definition of professional employee in § 111.70(1)(L) necessarily controls who is a professional employee for purposes of the collective bargaining agreements.

¶17 Local 2492-A also argues that Evenson was not entitled to union representation because she never paid union dues to Local 2492-A. Evenson does not appear to dispute this fact. She does, however, point to evidence that the reason she was not paying union dues was that the county directed its payroll department not to withhold dues from her pay at the request of a union representative. Local 2492-A does not dispute the reason for Evenson's nonpayment of dues, nor does it make any attempt to explain why Evenson should be denied union representation for nonpayment of dues when that nonpayment was prompted by the union. For that matter, Local 2492-A cites no authority for the proposition that nonpayment of dues, no matter the reason, is necessarily determinative of union representation.

¶18 Another Local 2492-A argument is that it did not represent Evenson because she had not completed her six-month probationary period in her new position. Yet, Local 2492-A does not point to facts, let alone undisputed facts, that Evenson was on probation when Local 2492-A filed the grievance or when Evenson was discharged. Rather, Local 2492-A asserts, without citation to the

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All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

record or to legal authority, that "[o]nce [Evenson] acquired the necessary credentials, she would not become a dues-paying member of Local 2492-A until her six-month probationary period was over." In another section of its briefing, Local 2492-A attempts to support this assertion by citing a copy of notes relating to Evenson's job status. These notes include the statement that Evenson "[w]ill serve a 6-month probationary period (limited – limits to be developed)," but the notes do not indicate whether Evenson was on probation at the times relevant here. Other evidence in the record indicates that Evenson's probationary period in her new position ended June 30, 2000.

¶19 Furthermore, Local 2492-A wholly fails to address *why* Evenson's probationary status determines the question of whether Local 2492-A owed her a duty of fair representation. Local 2492-A does not, for example, provide any factual or legal basis for concluding that county probationary employees are never entitled to union representation. Local 2492-A asserts, again without citation to the record or to authority, that "new" employees in Marathon County do not pay union dues until their probationary period is over. Local 2492-A does not elaborate on what it means by a "new" employee or why Evenson would be considered a new employee.

¶20 In short, Local 2492-A fails to demonstrate, based on applicable legal standards and undisputed facts, that it was entitled to a summary judgment determination that it did not owe Evenson a duty of fair representation.

2. Whether Council 40 Owed Evenson A Duty Of Fair Representation

¶21 Council 40 argues that it did not owe Evenson a duty of fair representation because the local unions are the employees' exclusive bargaining representatives. Yet, Council 40 plainly has at least some form of union-employee

relationship with employees such as Evenson. Council 40, in its own words, is "chartered by and affiliated with the [AFSCME], AFL-CIO. The AFSCME District Council exists for the purpose of employing a professional staff whose responsibility it is to provide advice and counsel, and other supporting services, to local AFSCME union leaders and the employees who are represented by AFSCME local unions." According to a copy of AFSCME's constitution that is in the record, AFSCME "may charter councils composed of local unions."

¶22 Council 40 asserts, however, that the locals, not Council 40, have the authority to make decisions concerning collective bargaining agreements and to initiate and settle grievances. Council 40 concedes that it provides advice and support services to the locals, but asserts that:

> The "duty of fair representation" is a function of the right to exercise an "exclusive" representation as it concerns employees' wages, hours and conditions of employment: where there is the power to act or not act regarding these matters, there also is a legal responsibility to exercise such power fairly. *E.g.*, ***Teamsters Local 30 v. Helms Express, Inc.***, 591 F.2d 211, 217 (3rd Cir. 1979). Where an organization's authority is limited to providing advice and counsel, and support services, as an agent of a client, the same legal responsibility does not exist. In the case at hand, it is AFSCME Local 2492-A that is the "exclusive representative," and not AFSCME District Council 40.

¶23 Council 40's argument is, in effect, that it *never* owes a duty of fair representation to its affiliated local union employees because Council 40 is not their exclusive bargaining representative and because Council 40's authority is limited to providing advice and support services to locals. Despite this far-reaching argument, Council 40 cites only ***Teamsters Local Union No. 30 v. Helms Express, Inc.***, 591 F.2d 211 (3d Cir. 1979), and that case does not support Council 40's broad assertions.

¶24 ***Teamsters Local Union No. 30*** involved whether a joint union-employer committee formed to resolve labor disputes owed a duty of fair representation to a union employee. ***Id.*** at 212, 216-17. The court concluded that the committee did not owe the employee this duty, in part because the committee was not the employee's exclusive bargaining agent. ***Id.*** at 217.

¶25 The joint union-employer committee in ***Teamsters Local Union No. 30*** is hardly analogous to Council 40. Although the parties here may disagree on the exact nature of the relationship between Council 40 and affiliated local employees, or between Council 40 and the locals themselves, Council 40 plainly exists to serve the interests of employees, not employers. Council 40 is nothing like the committee in ***Teamsters Local Union No. 30***, which served the joint interests of employee and employer.

¶26 Absent any other legal support for Council 40's no-duty argument, we reject it. Council 40 fails to demonstrate that the pertinent legal standards, as applied to the undisputed facts, entitle it to judgment as a matter of law on the question of whether it owed a duty of fair representation to Evenson.

B. Whether The Union Defendants Are Liable For Breaching The Duty Of Fair Representation

¶27 We next address the union defendants' arguments that, even if they owed Evenson a duty of fair representation, they are not liable for a breach of that duty. We address and reject each of these arguments.

1. Argument That Employee Must Show An Employer Breach Of The Collective Bargaining Agreement In Order To Prevail On A Claim Against The Union For Breach Of The Duty Of Fair Representation

¶28 Local 2492-A argues that, in order to prevail on a fair representation claim against a union, an employee must establish that the employer breached the collective bargaining agreement. Local 2492-A asserts that Evenson has not shown that the county breached the collective bargaining agreement.

¶29 Local 2492-A cites one case for the proposition that Evenson must show an employer breach of the collective bargaining agreement in order to prevail on a fair representation claim against her union. That case, ***DelCostello v. International Brotherhood of Teamsters***, 462 U.S. 151 (1983), does not establish this proposition.

¶30 ***DelCostello*** is representative of a class of cases in which an employee sues both the employer and the union, alleging that the employer breached a collective bargaining agreement and that the union breached its duty of fair representation by mishandling an ensuing "grievance-and-arbitration" proceeding. *See* ***id.*** at 154. The Court in ***DelCostello*** explained that ordinarily the rule is that an employee is required to exhaust grievance or arbitration remedies under the collective bargaining agreement before suing an employer, but that this rule works an injustice when the union handles a grievance or arbitration procedure in a manner that breaches the union's duty of fair representation. ***Id.*** at 163-64. "In such an instance," the Court explained, "an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." ***Id.*** at 164. "*Such a suit*, as a formal matter, comprises two causes of action.... 'Yet the two claims are inextricably interdependent. "To prevail against either the company or the Union, ...

[employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union."'" ***Id.*** at 164-65 (bracketed language in original).

¶31 Thus, ***DelCostello*** does not purport to set forth a general rule providing that an employee must prove an employer breach of the collective bargaining agreement in order to prevail on a fair representation claim against his or her union. More to the point, ***DelCostello*** does not support the union defendants' proposition that Evenson must show an employer breach of a collective bargaining agreement in order to prevail on her fair representation claim.

¶32 Furthermore, the union defendants' legal proposition is inconsistent with ***Breininger v. Sheet Metal Workers International Ass'n Local Union No. 6***, 493 U.S. 67 (1989). The Court in ***Breininger*** explained:

> The Court of Appeals below also held that if an employee fails to allege that his *employer* breached the collective-bargaining agreement, then he cannot prevail in a fair representation suit against his *union*. This is a misstatement of existing law….
>
> Our reasoning in ***Vaca*** [***v. Sipes***, 386 U.S. 171 (1967),] in no way implies … that a fair representation action *requires* a concomitant claim against an employer for breach of contract. Indeed, the earliest fair representation suits involved claims against unions for breach of the duty in *negotiating* a collective-bargaining agreement, a context in which no breach-of-contract action against an employer is possible. Even after a collective-bargaining agreement has been signed, *we have never required a fair representation plaintiff to allege that his employer breached the agreement in order to prevail*.

Id. at 80-81 (last emphasis added; citations omitted); *see also* 2 ZACHARY L. KARMEN, FEDERAL LABOR LAW: NLRB PRACTICE § 14.09, at 38 (2000)

("***Breininger*** … made clear that while a substantial jurisprudence has developed concerning hybrid fair representation/breach of contract claims where the employee elects to sue both employer and union, nothing in that jurisprudence requires that an independent fair representation claim contain a concomitant claim of employer breach.").

¶33 Lacking any other supporting argument by the union defendants, we will not reverse the circuit court's grant of summary judgment to Evenson based on the assertion that Evenson cannot prevail on her fair representation claim against the union without showing that the county breached the collective bargaining agreement.

2. Argument That Local 2492-A's Conduct Was Not A Breach

¶34 The union defendants argue that Local 2492-A's pursuit of the grievance did not constitute a breach of its duty of fair representation. The union defendants point to cases holding that a union does not violate its duty of fair representation simply because it compromises the interests of one or more individual members for the greater good of the union membership as a whole. *See, e.g.*, ***Griffin v. Air Line Pilots Ass'n Int'l***, 32 F.3d 1079, 1083 (7th Cir. 1994) ("[W]e must assume that many union actions satisfy a majority of its members to the chagrin of the few."); ***Mahnke v. WERC***, 66 Wis. 2d 524, 532, 225 N.W.2d 617 (1975) ("'In certain cases for the greater good of the members as a whole, some individual rights may have to be compromised.'" (quoting ***Fray v. Amalgamated Meat Cutters & Butcher Workmen of N. Am.***, 9 Wis. 2d 631, 641, 101 N.W.2d 782 (1960)); ***Gray v. Marinette County***, 200 Wis. 2d 426, 447, 546 N.W.2d 553 (Ct. App. 1996) ("Our supreme court recognized in ***Mahnke*** that

unions should have the freedom to represent one union member whose interests are opposed to the other.").

¶35 The union defendants are apparently suggesting that Local 2492-A's grievance was consistent with this case law because, when Local 2492-A filed the grievance, it was motivated by a need to act in its members' overall best interests, rather than in Evenson's individual interest. The union defendants' theory is summed up in the following passage excerpted from Local 2492-A's brief-in-chief:

> Local 2492-A wanted that position filled with a qualified social worker as soon as possible. The case load for each social worker was higher because they had to pick up the slack for the social worker position that was being held open for [Evenson]. [Evenson] was unable to be "on call" and, therefore, the other social workers had to carry the "on call" beeper more often.

¶36 A breach of the duty of fair representation occurs when a union's conduct toward a member is arbitrary, discriminatory, or in bad faith. *See* ***Mahnke***, 66 Wis. 2d at 531. We agree with the union defendants that Local 2492-A's motive in pursuing the grievance may be relevant to determining whether Local 2492-A's conduct was arbitrary, discriminatory, or in bad faith. However, the union defendants do not point to *evidence*, let alone undisputed evidence, supporting their proffered motive for the grievance. On the contrary, they fail to dispute evidence relied on by Evenson that undercuts this alleged motive. Specifically, Evenson points to evidence that, after she obtained her social worker credentials and management presented those credentials to Local 2492-A, the local continued to oppose Evenson's reinstatement, or at least refused

to support it.[4] The record also contains evidence that, at the time of Evenson's discharge, there was a moratorium on new hiring; that the fastest way to fill the vacancy created by Evenson's termination was to reinstate her; and that there was only a "50/50" chance that her position would be filled if she were not reinstated.

¶37 Thus, the union defendants' "greater good" theory is unsupported by evidence, much less undisputed evidence. And, the union defendants provide no other theory for why Local 2492-A did not breach its duty by filing the grievance resulting in Evenson's discharge. We therefore reject their attempt to seek summary judgment in their favor on the ground that the undisputed facts show that Local 2492-A did not breach its duty of fair representation.

¶38 It bears repeating that the union defendants are not arguing for reversal of the circuit court because there remains one or more issues of material fact. Rather, they seek reversal based only on the assertion that they are entitled to summary judgment. Thus, the question before us is not whether an independent review of the entire record might reveal a factual dispute material to the question of whether Local 2492-A's grievance breached its duty of fair representation to Evenson. The union defendants have not made that argument, and it is not this court's duty to develop their argument for them. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997) ("[W]e do not decide issues that are not adequately developed by the parties in their briefs."). Certainly, it is

[4] Council 40 attempts to characterize Local 2492-A's position as "not oppos[ing]" Evenson's reinstatement or as "tacit" support for her reinstatement, but Council 40 either fails to provide record cites for this characterization or cites portions of the record which do not show that that was Local 2492-A's position. In addition, Council 40 fails to refute evidence indicating that Local 2492-A never provided the county with a letter indicating Local 2492-A was "neutral" as to Evenson's reinstatement, even though the county would have immediately reinstated Evenson if Local 2492-A provided such a letter.

not this court's duty to sift the summary judgment record for possible factual disputes when no one is arguing that a factual dispute exists. *Cf.* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (court of appeals has neither duty nor resources to "sift and glean" the record for facts supporting a party's argument).

3. Council 40's Argument That It Has No Liability For Local 2492-A's Conduct

¶39 Council 40 argues that, even if Local 2492-A's conduct was "open to question," Council 40 is not liable. Citing ***Carbon Fuel Co. v. United Mine Workers of America***, 444 U.S. 212 (1979), and ***Consolidation Coal Co. v. Local 2216, United Mine Workers of America***, 779 F.2d 1274 (7th Cir. 1985), Council 40 argues that it cannot be "vicariously liable" for any duty-breaching conduct by Local 2492-A unless Council 40 supported, ratified, or encouraged that conduct.

¶40 Evenson does not dispute this standard. Thus, the question becomes whether Council 40 supported, ratified, or encouraged Local 2492-A's duty-breaching conduct. Evenson's position is that it did. She points to evidence that a Council 40 staff representative, Phil Salamone, assisted Local 2492-A in filing the grievance, and that Salamone was aware that Local 2492-A's goal was to secure Evenson's discharge.

¶41 Council 40 does not dispute that Salamone was involved in the grievance. The record contains testimony, undisputed by Council 40, that Salamone assisted in filing the grievance.[5] Council 40 instead focuses on its role

[5] Council 40 points to evidence in the form of a letter from Salamone to the Local 2492-A president that Salamone did not understand when he assisted in filing the grievance that the "purpose" of the grievance was to have Evenson terminated. Even assuming that this fact is undisputed, it would beg the question of whether Salamone *should have* understood the purpose (continued)

in obtaining Evenson's reinstatement after her discharge, in effect ignoring any role it had in the grievance that led to her discharge in the first place. Obviously, Evenson would not have had to seek reinstatement had she not been discharged. Council 40 fails to address why its role in the grievance does not constitute support, encouragement, or ratification of duty-breaching conduct by Local 2492-A. Council 40 seems to assume that its later efforts cured any breach or that the question of its liability should be determined only by reference to the efforts it undertook on Evenson's behalf *after* her discharge. Council 40 assumes too much. We find its argument incomplete, and will not reverse the circuit court in the absence of a developed argument that the undisputed facts show that Council 40 did not support, ratify, or encourage Local 2492-A's grievance.[6]

C. Whether The Circuit Court Erred In Awarding Evenson All Of Her Attorney's Fees As Damages

¶42 The circuit court awarded Evenson a total of $37,094.41. Of that total, it appears undisputed that $8,178.80 represents the attorney's fees and costs Evenson incurred to obtain reinstatement. The balance, $28,915.61, represents the attorney's fees and costs Evenson incurred prosecuting this action against the union defendants. With respect to the $8,178.80 award, we need not differentiate between costs and attorney's fees because we affirm the entire amount. With respect to the $28,915.61 award, we conclude that the portion attributable to

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of the grievance when he assisted in filing it. In any event, Salamone indicates in the same letter that he "had doubts/suspicions early on as to the actual motivations" behind the grievance.

[6] We summarily reject Council 40's assertion that Evenson's claim against it is frivolous. Likewise, we summarily deny Council 40's motion for attorney's fees and costs on appeal, as that motion is based on a similar assertion that Evenson's position on appeal concerning Council 40 is frivolous. Our discussion of the various issues in this case demonstrates that Evenson's claim against the union defendants is not frivolous.

attorney's fees was improperly awarded to Evenson. As to the costs portion of that award, we perceive no dispute. That is, the union defendants do not argue that, if we affirm the circuit court with regard to Evenson's fair representation claim, she is not entitled to costs for this lawsuit. We now proceed to explain our reasoning.

1. Attorney's Fees Incurred To Obtain Reinstatement

¶43 The union defendants do not dispute that, if they violated their duty of fair representation, they are liable for "the sum which [Evenson] was forced to expend in attorney fees to do that which the [unions were] obligated, but failed, to do." ***Zeman v. Office & Prof'l Employees Int'l Union Local 35***, 91 F. Supp. 2d 1247, 1252 (E.D. Wis. 2000). As to the amount Evenson incurred to get reinstated ($8,178.80), the union defendants make two arguments. We address each argument in turn.

¶44 The union defendants first argue that Evenson did not need to hire an attorney to obtain reinstatement. They assert that, by the time Evenson met with her attorney, Salamone of Council 40 had already set in motion the process that resulted in Evenson's reinstatement. We are not persuaded. Because Local 2492-A, with assistance from Council 40, sought to have Evenson discharged, it would have been unreasonable to expect Evenson to rely solely on the union defendants to obtain her reinstatement. Also, even if the union defendants are correct that Salamone's efforts had set in motion the process resulting in Evenson's reinstatement, the union defendants do not demonstrate that Evenson would have been reinstated without the assistance of her attorney. To put a finer point on it, the union defendants do not identify undisputed evidence that shows it was unnecessary for Evenson to hire an attorney.

¶45 The union defendants' second argument is that, even assuming that Evenson needed an attorney, the $8,178.80 her attorney charged was unreasonable. On this topic, once it is established that some fees are appropriate, the reasonableness of the amount is ordinarily a discretionary call for the circuit court. ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. Since the union defendants do not argue otherwise, we will review the circuit court's award on this topic under the erroneous exercise of discretion standard.

¶46 In arguing that the $8,178.80 amount was unreasonable, the union defendants first rehash their previous argument, suggesting that Evenson's attorney's services were largely unnecessary. We need not revisit that argument.

¶47 In addition, the union defendants argue that Evenson's attorney spent an unreasonable amount of time—approximately 50 hours—obtaining Evenson's reinstatement. They provide a list of reasons why, in their view, this amount of time was unreasonable. The reasons include that Salamone, who is not an attorney, opined that four to six or eight hours should have been enough to work out the terms of Evenson's reinstatement; that the county's attorney billed the county for only 7.1 hours of work in connection with Evenson's case; and that Evenson's attorney was never required to leave his office during the time he spent representing her. None of these arguments persuade us that the circuit court erroneously exercised its discretion. We can, as the circuit court apparently did, readily conceive of reasons why the amount of time Evenson's attorney spent on her case was reasonable. Accordingly, we decline to upset the circuit court's implicit determination that $8,178.80 was a reasonable amount.

2. Attorney's Fees Incurred For Prosecuting This Action

¶48 The union defendants argue that awarding attorney's fees for prosecuting this action violates the American Rule. Although their argument on this point could have been clearer, both here and in the circuit court,[7] we agree with the union defendants that denial of these fees is required by a straightforward application of the American Rule.

¶49 The American Rule provides that each party to a lawsuit ordinarily should bear its own attorney's fees. *See* ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 744, 351 N.W.2d 156 (1984). The Rule generally "holds that, 'absent statute or enforceable contract, litigants pay their own attorneys' fees [for prosecuting suit].'" ***Milwaukee Teacher's Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.***, 147 Wis. 2d 791, 795, 433 N.W.2d 669 (Ct. App. 1988) (citation omitted).

¶50 It is important to recognize that this case does not involve a fee-shifting statute. Thus, case law holding that attorney's fees are recoverable for the time necessary to litigate the recovery of attorney's fees *under a fee-shifting statute* is not applicable here. *See, e.g.*, ***Chmill v. Friendly Ford-Mercury of Janesville, Inc.***, 154 Wis. 2d 407, 413-16, 453 N.W.2d 197 (Ct. App. 1990).

¶51 We turn for guidance, as do the parties, to federal labor relations cases. These cases uniformly hold that the American Rule ordinarily applies when

[7] For example, at the hearing at which the circuit court addressed attorney's fees, the attorney for Council 40 spent most of his time rearguing the merits of Council 40's actions with respect to Evenson's discharge. This tactic obscured what should have been the main focus of the hearing, namely, whether the American Rule precludes an award of attorney's fees for prosecuting this action against the union defendants.

a union member sues his or her union alleging a breach of the duty of fair representation. For example, in ***Zuniga v. United Can Co.***, 812 F.2d 443, 453 (9th Cir. 1987), the court wrote that "an award of damages which includes the employee's expense in prosecuting his claim against the union itself is improper since such an award would penalize the union for litigating the issue of whether it breached its duty of fair representation." *See also* ***Bennett v. Local Union No. 66, Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union***, 958 F.2d 1429, 1440 (7th Cir. 1992) ("To avoid conflict with the American rule, courts generally limit fees awarded as damages [in certain employee actions against both employer and union] to the expenses incurred in pursuing the claim against the employer, and not the claim against the union."); ***Ames v. Westinghouse Elec. Corp.***, 864 F.2d 289, 293 (3d Cir. 1988) ("When there is a legal duty to provide representation, … if the representation is wrongfully withheld, the cost of substitute representation should be recoverable damages. This is not to say that in the suit against the Union fee shifting as such would be appropriate."); ***Zeman***, 91 F. Supp. 2d at 1249 ("[U]nder the American Rule, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney fee from the loser.").

¶52 Evenson does not dispute the proposition that the American Rule applies here. Instead, Evenson argues that awarding her attorney's fees for this lawsuit against the union defendants is consistent with the result in the Seventh Circuit's ***Bennett*** decision. We disagree.

¶53 ***Bennett***, like many of the cases the parties rely on, involves attorney's fees for prosecuting a "hybrid" action in which an employee sues both the employer for breach of the collective bargaining agreement and the union for breach of the duty of fair representation. *See* ***Bennett***, 958 F.2d at 1431, 1433. The ***Bennett*** court acknowledged the general applicability of the American Rule,

but nonetheless upheld an award of all the employee's attorney's fees, which the trial court had imposed jointly and severally against the employer and union instead of apportioning the fees. *See* ***id.*** at 1433, 1439-41. The court explained that the joint suit involved a union and employer that "participated" in each other's breaches and that had "affirmatively and fraudulently" deprived the employee of her union status. ***Id.*** at 1440-41. Thus, "the fees incurred in both components of [the] hybrid action were 'necessarily intertwined.'" ***Id.*** at 1440. The ***Bennett*** court's readily apparent conclusion was that it was not practical to separate out which attorney's fees related solely to the suit against the union.

¶54 Regardless whether it may reasonably be said that the union defendants here joined together with the county to deprive Evenson of her union status, it cannot be said that the fees were "necessarily intertwined." To the contrary, the chronology of events makes it simple to determine which fees Evenson incurred in prosecuting the suit against her union. Before Evenson sued the union defendants, she suffered what she contends were damages owing to the union defendants' breach of their duties of fair representation. She also explains that suit against the county ultimately proved unnecessary because her reinstatement agreement essentially made her whole vis-à-vis the county. At that point, her only remaining claim for damages was the attorney's fees she incurred in obtaining reinstatement, and she chose to pursue that claim solely against the union defendants.

¶55 Accordingly, based on the arguments before us, we conclude that the American Rule applies, and the circuit court erred when it awarded Evenson attorney's fees for prosecuting this action.

Conclusion

¶56 For the reasons stated above, we affirm the portion of the circuit court's judgment granting summary judgment to Evenson and awarding her $8,178.80 in attorney's fees and costs she incurred to obtain reinstatement. We also conclude that Evenson is entitled to the portion of the $28,915.61 amount attributable to costs. However, we reverse the portion of the judgment awarding Evenson attorney's fees for prosecuting this lawsuit. The circuit court is directed to amend the judgment to eliminate the portion of the award attributable to attorney's fees for prosecuting this lawsuit.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.